THE ONTARIO HUMAN RIGHTS CODE,

S.O. 1981, Chapter 53, as amended

IN THE MATTER OF the complaint made by Michelle Crane dated August 29, 1986 alleging discrimination in employment on the basis of sex by McDonnell Douglas Canada Ltd. and Mr. Ken Cooper.

A HEARING BEFORE: Professor John D. McCamus

Appointed a Board of Inquiry into the above matter by the Minister of Citizenship, the Hon. Elaine Ziemba, to hear and decide the above-mentioned complaint.

Ruling on Motions

Appearances:

Kikee Malik	Counsel to the Ontario Human Rights Commission
Michelle Crane	Complainant
James Noonan Louise Tennant	Counsel to the respondents McDonnell Douglas Canada Ltd. and Ken Cooper

This is a ruling made on certain motions made by Counsel for the Respondents in the present matter at the commencement of the day of hearings scheduled for December 15, 1992. Having made the motions which are the subject matter of this ruling, Counsel further requested that this ruling and the reasons therefore be issued in writing and that the proceedings be adjourned sine die until the ruling is available to the parties. The request for such an adjournment was not opposed by Counsel for the Ontario Human Rights Commission. For this reason, and by virtue of the fact that the reasons offered by Counsel in support of the request were substantial and compelling, this request for an adjournment sine die was granted, pending the issuing of this written ruling.

These proceedings arise from a Complaint made by the Complainant concerning the termination of her probationary employment with the Respondent corporation, McDonnell Douglas Canada Ltd. on May 13, 1986. The personal Respondent, Mr. Ken Cooper, was the Complainant's supervisor at the time the decision was made by the corporate Respondent to terminate the Complainant's employment. The Complainant alleges that the decision to terminate her employment rested on discrimination on the basis of sex, and more particularly, that the decision is to be explained by the fact that the personal Respondent "did not want a woman working in his department."

At the commencement of the first day of hearings scheduled for the presentation of viva voce evidence, on November 16, 1992, a motion was made by Counsel for the Respondents requesting a dismissal of the Complaint on the ground of undue delay in its

investigation and in the appointment of the present Board of Inquiry by the Minister of Citizenship.

On that occasion, extensive submissions were made by Counsel for the Respondents in support of that motion and, in reply, by Counsel for the Commission. The Board reserved on this motion and communicated a decision dismissing the motion to the parties orally at the commencement of the hearing scheduled for Monday, December 7, 1992. The reasons underlying the decision to dismiss the motion were explained on the occasion at some length. Though Counsel for the Respondents had initially requested that any decision to dismiss this motion be made in writing, this request was abandoned by Counsel on December 7.

In support of the initial motion to dismiss the Complaint, Counsel for the Respondents argued that in addition to other disadvantages flowing from the substantial passage of time from the initial making of the Complaint, a number of prejudicial developments had occurred. The principal item of prejudice relied upon was the death of Mr. John Cieslik in February, 1992. Mr. Cieslik had been one of the Complainant's two supervisors during the first half of her approximately two months of employment with the Respondent corporation in 1986. It was alleged in support of the Respondents' motion to dismiss that Mr. Cieslik's evidence concerning the suitability of the Complainant for permanent employment could have been very important to the Respondents and, as it was now unavailable to them, severe prejudice could result.

In reply, Counsel for the Commission argued that the prejudice flowing from the unavailability of Mr. Cieslik's evidence was insubstantial. Counsel for the Commission noted that the Respondent corporation, in its response to the Complaint, had conceded that the Complainant's performance was satisfactory during the time when she was supervised by Mr. Cieslik. Accordingly, or so Counsel for the Commission argued, it seemed likely that Mr. Cieslik's evidence would likely only confirm that her work was satisfactory during this period and would therefore merely offer support for a point conceded by the Respondent. Thus, the real prejudice suffered by Mr. Cieslik's unavailability was the inability of the Complainant to lead evidence from Mr. Cieslik concerning the satisfactory nature of her performance while under his supervision. These submissions by Counsel for the Commission were found persuasive by the Board of Inquiry and formed part of the oral reasons given on December 7, 1992 for denying the Respondents' motion to dismiss the Complaint.

As the proceedings unfolded on December 7, however, it became apparent that the question of the prejudice, if any, arising from the unavailability of Mr. Cieslik was a more problematic question than, apparently, either Counsel had anticipated on November 16, 1992. As the Complainant testified on December 7, 1992, it became apparent that Counsel for the Commission wished to lead from her testimony concerning certain statements made by the deceased Cieslik to the Complainant which offered some support for her suspicion and concern that the Respondent Cooper was opposed to the

idea of women working in the area of the plant which he supervised. During a brief adjournment, discussions between Counsel occurred, and, upon reconvening, the Board of Inquiry was advised that it was expected that Counsel for the Commission would seek to lead evidence from two further witnesses, Mr. Caruana and Mr. Green, that would also provide an account of statements made by the deceased Cieslik that indicated that Mr. Cieslik believed that the Respondent Cooper was unsympathetic to the idea of women working in his department.

In response to this disclosure, Counsel for the Respondents indicated that he wished to renew his motion for dismissal of the Complaint, or alternatively, make a new motion to this effect. Further, he indicated that he wished to object to the admissibility of the evidence which Counsel for the Commission indicated that she wished to lead. Counsel for the Respondents further requested that an adjournment of a few days be granted in order to allow him to prepare to argue these motions. An adjournment was granted, ultimately to Tuesday, December 15, 1992, at which time the proceedings were reconvened and submissions from both Counsel were entertained. In the interim, further particulars had been provided by Counsel for the Commission to Counsel for the Respondents concerning the evidence which she proposed to introduce concerning statements made by the deceased Cieslik. As well, Counsel for the Commission indicated that she proposed to lead evidence from Mr. Glassco concerning certain statements made by Mr. Cooper and overheard by Mr. Glassco that tended to suggest sexist bias on the

part of Mr. Cooper. A memorandum setting out those particulars was filed, upon the agreement of Counsel, as Exhibit 7. Exhibit 7 will be reproduced at a later point in these reasons.

In his submissions on December 15, Counsel for the Respondents devoted most of his attention to arguments concerning the admissibility of hearsay evidence concerning statements made by Mr. Cieslik. With respect to the renewal of the motion to dismiss, Counsel for the Respondents relied essentially on the arguments made in support of the initial motion to dismiss on November 16, 1992. Counsel added, of course, that the question of prejudice flowing from the unavailability of Mr. Cieslik must now be resolved in favour of the Respondent on the basis that his unavailability would now appear to be highly prejudicial to the Respondent in the event that evidence concerning statements made by the deceased Cieslik were led from the four witnesses identified by Counsel for the Respondent.

Before turning to consider the merits of the motions made by Counsel for the Respondents on December 15, it will be useful to recapitulate and briefly explain the ruling made on December 7 to deny the initial motion made by the Respondents to dismiss the Complaint.

I. <u>The Initial Motion to Dismiss the Complaint</u>

In the submissions made by Counsel on November 16, three issues attracted particular attention:

(1) Whether a Board of Inquiry constituted under the Ontario Human Rights Code possesses a jurisdiction to dismiss

complaints for delays occurring prior to the appointment of the said Board of Inquiry,

(2) Whether a complaint against a personal respondent could be dismissed on the basis that undue delay has violated the respondent's protection of "security of the person" under Section 7 of the Canadian Charter of Rights and Freedoms, and

(3) Whether, on the present facts, the Board of Inquiry should exercise a discretion to dismiss the complaint because of undue delay occurring prior to the appointment of this Board of Inquiry.

In ruling to dismiss the motion on December 7, my analysis of these three issues, briefly stated, was as follows:

(1). Jurisdiction of a Board of Inquiry to dismiss for undue delay.

It is unnecessary to review the arguments made by Counsel on this point or, indeed, previous decisions of Boards of Inquiry considering this point as the matter appears to be settled, for present purposes, by the decision of the Ontario Divisional Court in Latif v. Ontario Human Rights Commission (Div. Ct., 488/91, unreported, March 11, 1992). In that case, Chief Justice Callaghan indicated, on behalf of the Court, that it is the duty of a Board of Inquiry, not the Court, to decide in the first instance whether a complaint should be stayed or dismissed by reason of delay.

Reference was further made by the Chief Justice to the decision of a Board of Inquiry in Gohm v. Domtar Inc. (No.I) (1989), 10 C.H.R.R. D/5968 (Ont.Bd.Inq.) in which the Board discussed the nature of its jurisdiction to dismiss for undue delay. By virtue of the reference to this decision by the Chief Justice and in light of the fact that the Gohm decision appears to reflect a consensus amongst Ontario Boards of Inquiry with respect to the jurisdiction to dismiss, I indicated on December 7 that, for present purposes, I accepted that the jurisdiction to dismiss exists and should be exercised on the following basis. Although Boards of Inquiry possess a discretion to dismiss, given the harsh impact of such a decision on the rights of the complainant the jurisdiction should be sparingly exercised. More particularly, the jurisdiction should be exercised in favour of respondents only in cases where either (a) the passage of time has made it impossible for the Board to carry out its task of ascertaining whether certain facts have occurred or, (b) the passage of time has so prejudiced the respondent that conducting the inquiry would constitute an "abuse of process." The reference to "abuse of process" is drawn from section 23(1) of the Statutory Powers Procedure Act which enables tribunals to make such orders as they consider necessary to prevent an "abuse" of their processes.

(2) Applicability of Section 7 of the Charter of Rights and Freedoms.

On behalf of the personal Respondent, Counsel for the Respondents argued that the delay which occurred between the filing of the initial Complaint and the appointment of this Board of Inquiry was unreasonable and thus constituted an infringement of the protection afforded by section 7 of the Charter to "security of the person." Support for this proposition was drawn from a line of Saskatchewan authorities, the most important of which is the decision of the Saskatchewan Court of Appeal in Kodellas v. Saskatchewan Human Rights Commission (1989), 10 C.H.R.R. D/6305. In that case, a four-year delay was held to constitute such an infringement. In reaching that conclusion, the Court placed reliance on an articulation of the Section 7 interest offered by the Supreme Court of Canada in Mills v. R., [1986] 1 S.C.R. 863 at pages 919 and 920 where Lamer, J., stated as follows:

> "...the concept of security of the person is not restricted to physical integrity; rather, it encompasses protection against 'overlong subjection to the vexation and vicissitudes of a pending criminal accusation'... These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction. These forms of prejudice cannot be disregarded nor minimized when assessing the reasonableness of delay."

The Mills case dealt with a criminal prosecution and it is not obvious, of course, that a Section 7 analysis developed in the context of the criminal law would be applicable to proceedings arising from complaints under human rights legislation. Nonetheless, the Saskatchewan Court felt that the Mills analysis could be so extended. The complaint in Kodellas related to sexual harassment and sexual assault. The Saskatchewan Court noted that a quasi-criminal prosecution could be brought with respect to such allegations under the Saskatchewan Human Rights Code. As it would be difficult, in the Court's view, to draw a distinction between a criminal prosecution arising from such facts and a quasi-criminal prosecution arising from such facts, the Section 7 analysis should apply to the quasi-criminal context. Further, as it would be invidious to draw a distinction between quasi-criminal proceedings under the Human Rights Court and civil proceedings under the Code - the kind at issue in Kodellas itself - the Section 7 analysis should be extended to civil proceedings, as well.

As Section 7 protects "security of the person" by conferring "the right not to be deprived thereof except in accordance with the principles of fundamental justice," the Court went on to consider whether unreasonable delay would violate those principles. The Court concluded that it could and went on to identify a number of factors to be taken into account in considering whether the delay in question constitutes an infringement of Section 7. First, the court should ask whether the length of the delay is prima facie unreasonable. Second, the court should consider the reasons for

the delay. Third, the court should consider the nature of any prejudice flowing from the delay. That prejudice could take the form either of an impairment in the ability of the respondents to make their defence or, alternatively, in the intensification of the psychological injuries resulting from a prolongment of the proceedings. On the facts in Kodellas, the Court was satisfied that these requirements were met.

Although the Kodellas decision has been applied by other courts in Saskatchewan, the doctrines set out in that case have not been favourably received, as yet, in Ontario. As I indicated to Counsel on December 7, I find that the criticisms made of the Kodellas analysis by Boards of Inquiry in Ontario are quite persuasive. Rather than explicate this point in detail, I simply referred Counsel to the decision of Professor Dawson in Hall v. A-I Collison and Latif (unreported August 28, 1992, Ont.Bd. Inq.) at pages 23 to 38. Some further points were raised in a discussion of my own, sitting as a Board of Inquiry in Lampman v. Photoflair Ltd. and Smith (unreported, September, 1992 Ont.Bd.Inq.) at pages 9 to 15.

Although it is not necessary, for present purposes, to reproduce lengthy passages from these previous decisions, it may be helpful to briefly allude to the kinds of reasons offered, therein, for declining to apply the Kodellas line of authority within the context of proceedings under the Ontario Human Rights Code. In the Hall case, Professor Dawson provided an extended and careful analysis of the distinctions that can be drawn between criminal

proceedings, on the one hand, and civil proceedings under the Human Rights Code, on the other, which led her to conclude that delay in the latter context does not similarly engage the individual's right to "life, liberty and the security of the person." Thus, for example, a human rights complaint may be filed as of right and therefore, unlike the laying of a criminal charge, implies no suspicion on the part of an investigating authority that wrong-doing has occurred. Secondly, unlike criminal prosecutions, the identity of complainants and respondents in human rights cases are treated as confidential, at least in the early stages of the investigation. Thirdly, a human rights proceeding is not a prosecution "by the state for a public offence involving punitive sanctions." The board of inquiry has no power to fine or incarcerate respondents. Board orders are compensatory in nature. Further, boards of inquiry have no authority to impose pre-trial custody or bail conditions. In short, the civil proceedings under the Human Rights Code are, in these respects, quite unlike criminal proceedings with respect to their impact on "life, liberty and security of the person."

In Lampman, it was noted that the Kodellas decision requires a board of inquiry to engage in the making of some rather unattractive distinctions. Kodellas distinguished between stressful complaints of the kind arising in that case (and to which Section 7 therefore applies) and less stressful complaints (to which Section 7 would not apply). It was suggested in Lampman that this would be a very difficult line to draw. It was said to be

difficult to generalize about the amount of stress caused by a particular "type" of complaint and indeed, to determine the amount of stress which would be sufficient to engage Section 7. Further, many kinds of civil claims could give rise to similar levels of stress and anxiety. Nonetheless, it would be surprising if limitations statutes and other statutory rules permitting delay in launching or prosecuting such proceedings were found to constitute violations of Section 7. Further, it was suggested that some difficulty might be encountered in determining the impact of delay in increasing normal levels of stress and anxiety arising from the complaint, thus rendering it difficult to determine when delay has caused a sufficient prejudice of this kind. Finally, it was noted that the Kodellas line of authority draws an unattractive distinction between personal and corporate respondents. Section 7 protection is available only to the former. Thus, in a typical case, the proceeding could continue against the corporate respondent. In many cases, this would surely mean that the continuation of the proceeding against the corporate entity would give rise to that very stigmatization, anxiety and stress that the Kodellas court sought to ameliorate on the basis of Section 7.

For reasons such as these, which are set out in greater length in the decisions referred to above, I concluded that it would be inappropriate to extend Section 7 analysis into the context of civil proceedings under the Ontario Human Rights Code.

I should add that in recent Ontario decisions, respondents have also argued for the applicability for Section 11 of the

Charter in cases of alleged unreasonable delay. In the present proceeding, Counsel for the Respondents conceded - and I take this to be a well-established proposition - that the Section 11 jurisprudence concerning delay does not apply to civil proceedings under the Ontario Human Rights Code.

(3) Exercising the discretion to dismiss on the present facts.

As has already been indicated, there appears to be a consensus in the jurisprudence of Ontario Boards of Inquiry that a discretion to dismiss a complaint by reason of undue delay should be exercised only sparingly and, more particularly, where either the passage of time has made it impossible to continue the proceeding or, alternatively, the delay in question constitutes an "abuse of process." No suggestion of "impossibility" was made in the present case and accordingly, it became necessary to determine whether the delay in the present case constituted an "abuse of process" in requisite sense. In cases like Gohm, Ontario Boards of Inquiry have taken the view that an "abuse of process" would occur in any case where the passage of time had so prejudiced the Respondent that it would be unfair for the proceeding to continue. In other words, it is not normally the case that the mere passage of time will constitute an abuse; rather, the critical question will be whether resulting prejudice has made it unfair to continue.

In support of the motion to dismiss, Counsel for the Respondents placed particular emphasis on the unavailability of Mr. Cieslik. Though the Respondents had earlier concluded that they

could not find another potential witness, Mr. Raj Sood, the Respondents had recently been advised that the Ontario Human Rights Commission had, indeed, been able to locate Mr. Sood. The Respondents were also concerned about prejudice resulting from the fact that another potential witness, Mr. James Aldridge had moved to California. However, Counsel for the Commission indicated that she would be quite content to have Mr. Aldridge's evidence submitted by affidavit, with any resulting cross-examination to be conducted in a telephone conference call. As Mr. Aldridge's evidence related essentially to the existence of certain personnel policies at the Respondent corporation during the material period of time, this was, in my view, a satisfactory device for resolving any prejudice flowing from the fact that Mr. Aldridge had moved to California. Finally, Counsel for the Respondents argued that the passage of time created a general problem of faded memory of witnesses and a resulting difficulty in leading evidence on behalf of the Respondents.

As has already been indicated, when this matter was argued on November 16, it was assumed that the only prejudice flowing from Mr. Cieslik's unavailability was the Respondents' inability to lead evidence from Mr. Cieslik concerning the quality of the Complainant's work performance during the early part of her probationary employment. As the Respondent corporation has elsewhere conceded that the Complainant's performance was satisfactory during this period, and, moreover, as another of the Complainant's supervisors during this period was available to

testify, the unavailability of Mr. Cieslik did not appear to create, in my view, substantial prejudice and I so indicated to the parties on December 7. With respect to the argument to the mere passage of time, itself, created prejudice as a result of memory loss, I noted that the delay here was quite similar to that experienced in the Gohm case and I indicated that it was in my view inappropriate to dismiss, merely as a result of the passage of time, in the absence of more specific evidence of prejudice.

For the foregoing reasons, then, the motion brought on behalf of the Respondents to dismiss the Complaint for undue delay on November 16 was denied.

II. The proposed evidence that gives rise to the motion made on December 15, 1992

As has been indicated, at the commencement of the proceeding on December 15, 1992, a written document was filed as Exhibit 7, with the consent of Counsel, setting out the evidence which the Commission proposed to lead and which has given rise to the present motions. The body of that Exhibit reads as follows:

> The Ontario Human Rights Commission seeks to introduce through testimonial evidence the following:
>
> 1. Michelle Crane
>
> It is anticipated that Ms. Crane will give evidence that prior to her transfer to Dept. 408 she heard through several of her co-workers that Ken Cooper didn't like women working in his department. It is anticipated that Ms. Crane will testify that as a result of hearing these comments she approached Mr. Cieslik with questions about her probation and that Cieslik advised her that she

should just continue on with her good work and she would make her probation. It is also anticipated that Ms. Crane will testify that after she had commenced working in Dept. 408, Mr. Cieslik approached her and advised her that Mr. Cooper had been in the office complaining about how Ms. Crane could have made it thus far in her probation.

2. Eddie Caruana

It is anticipated that Mr. Caruana will give evidence as to a conversation he had with Mr. John Cieslik wherein Mr. Cieslik advised Mr. Caruana that Michelle Crane may have difficulties in her probation in Department 408 because Ken Cooper did not want women working in the Department.

3. Joe Green

It is anticipated that Mr. Green will give evidence of a conversation he had with Mr. John Cieslik wherein Mr. Cieslik advised Mr. Green that a record of production should be kept for Michelle Crane because Ken Cooper may use Ms. Crane's work performance against her.

4. Richard Glassco

It is anticipated that Mr. Glassco will give evidence that he has overheard Ken Cooper make statements to the following effect: a) that there is no place for women at McDonnell Douglas; b) that there is no place for women in his Department; c) a woman's place is at home and on her back.

It is against this background, then, that Counsel for the Respondents, on December 15, made two motions, one renewing the requrest to dismiss the Complaint because of unreasonable delay and the other seeking a ruling that the evidence from each of the proposed four witnesses should be ruled inadmissible.

III. The renewed motion to dismiss

In support of the renewed motion to dismiss, on December 15, Counsel for the Respondents made essentially two points. First, he

reiterated the arguments made on November 16 and urged that in the light of this further indication of the potential importance of Mr. Cieslik's testimony, the question of prejudice ought now clearly to be resolved in favour of the Respondents and the motion to dismiss ought therefore to enjoy success. Secondly, he argued that, in any event, the Commission failed to advise the Respondents - at any time prior to a few days before the December 15th hearing - of the nature of the allegations being made by these witnesses against the Respondent Cooper and that this failure constituted an abuse of process in the requisite sense.

With respect to the first point, it is indeed clear that the unavailability of Mr. Cieslik is much more prejudicial to the Respondents than appeared to be the case on November 15th. Parenthetically, I should observe that there was no suggestion made by Counsel for the Respondents that Counsel for the Commission had failed to discharge any duties she personally owed to make disclosure of the nature of the evidence concerning Mr. Cieslik at an earlier point in time. In determining, as I must, whether the extent of prejudice is so severe that it would be unfair to continue the proceeding, it is important, in my view, to consider what alternatives there might be, other than a complete dismissal of the Complaint, for ameliorating the prejudicial effects of the delay. In Hyman v. Southern Murray Printing Ltd. (1982) 3 C.H.R.R. D/617, I had suggested, as a general rule, that boards of inquiry ought to proceed with hearing complaints, even in cases of substantial delay, and "weigh the prejudice or unfairness to a

particular party which may have been occasioned by delay in making particular findings of fact or in refusing or fashioning a remedy" (at paragraph 5619). I remain of the view that this is the proper approach and I agree with the submission of Counsel for the Respondents to the effect that a further device for ameliorating unfairness or prejudice could be rulings against the admission of certain types of evidence that might give rise to particularly severe prejudice. Given the harsh impact of the granting of a motion to dismiss on the rights of the complainant - an individual who will typically not have contributed to the delay, as is the case here - it is my view that a very substantial burden rests on a respondent to demonstrate that the prejudice to the respondent is so severe that the only fair course is to dismiss the complaint at the outset of the proceeding.

In the present circumstances, then, it is appropriate to consider whether the prejudice that no doubt has occurred can be sufficiently offset by these other devices or whether, in fairness, the entire proceeding should be discontinued. It is my view that any undue prejudice or unfairness resulting from the unavailability of Mr. Cieslik can, indeed, be ameliorated through reliance on one or more of these devices. Moreover, as was suggested in the Gohm case, it may well be that even though it is appropriate to deny a motion to dismiss at the outset of a case, "this decision does not foreclose the possibility that some time during the hearing it may appear that the complaint should be dismissed because the respondents are suffering undue prejudice in the presentation of

their defence, or it is otherwise impossible to proceed" (at paragraph 43200).

The second point made by Counsel in support of the renewed motion to dismiss was that the failure of the Commission to disclose the nature of the evidence set out in Exhibit 7 constituted a failure by the Commission to disclose the "nature of its case" to the Respondents and that this failure to do so constitutes, in itself, an abuse of process. Counsel for the Commission argued, in reply, that the Commission had indeed disclosed the nature of the Complaint made against the Respondents - a Complaint to the effect that the Complainant's termination was motivated by gender bias - and that no obligation fell upon the Commission to disclose precisely the nature of the evidence it would lead in support of the Complaint. For present purposes, I am prepared to assume that there could exist circumstances in which a failure to disclose "the nature of the case" could constitute an abuse of process. Even on that assumption, however, I am not persuaded that such an obligation would extend to the present circumstances in a sense that it would require the Commission to disclose the identity of all potential witnesses and the nature of the evidence that would be led from them. The Respondents were aware that it was being suggested that the Respondent Cooper had been motivated, at least in part, by gender bias. The Respondents were therefore on notice that such an allegation would be made and it was obviously open to the Respondent corporation to make whatever inquiries it deemed fit of Mr. Cooper to determine whether

or not either or both of the Respondents were vulnerable to such an allegation. While it would no doubt be helpful to the Respondents to have a greater awareness of the precise nature of the evidence that might be led, I am not aware of any legal basis for the imposition of such a comprehensive duty of disclosure upon the Commission. No human rights jurisprudence was relied upon by Counsel for the Respondents in support of this proposition. Nor was citation made of any analogous authorities from administrative law more generally or from the law of civil procedure. While full disclosure may conduce to more effective negotiations with a view to settlement, there may be a number of reasons why the Commission might fail to disclose or might, indeed, be unable to disclose the nature of the evidence it might ultimately bring before a board of inquiry in precise detail. Accordingly, it is my view that the failure by the Commission, in the present case, to fully disclose the nature of the evidence it would ultimately propose to lead before this Board of Inquiry, does not constitute an abuse of process in the requisite sense.

IV. <u>The motion concerning admissibility</u>

The second motion, made in the alternative by Counsel for the Respondents, was that if the hearing is to proceed, the proposed evidence described in Exhibit 7 should be ruled inadmissible. As a preliminary point, I should note that both Counsel agreed that it was appropriate for a ruling to be made on this point at this stage of the proceedings and on the basis of the description of the

proposed evidence set out in Exhibit 7.

As Counsel for the Respondents noted, there are two different types of evidence described in Exhibit 7. The first type of evidence, which was to be led from Ms. Crane, Mr. Caruana and Mr. Green, pertained to statements made by the deceased Cieslik to each of these three witnesses which suggested the possibility that the Respondent Cooper could be motivated by gender bias in his treatment of Ms. Crane during her probationary period. In each case, this would be evidence of a witness to whom the deceased Cieslik made statements indicating Mr. Cieslik's opinion of the attitudes that Mr. Cooper might bring to bear on this matter. Parenthetically, I should note that Counsel for the Respondents has no objection to part of the evidence that Exhibit 7 indicates would be led from Ms. Crane. Exhibit 7 indicates that Ms. Crane's evidence would include evidence to the effect "that Cieslik advised her that she should just continue on with her good work and she would make her probation." As this evidence would not reflect unfavourably on the Respondent Cooper, Counsel for the Respondents has no objection with respect to its admission. The remainder of the evidence to be given by Ms. Crane concerning statements made to her by Mr. Cieslik about the Respondent Cooper, however, were objected to by Counsel for the Respondents.

The second category of evidence is that to be lead through Mr. Glassco. Mr. Glassco would not be giving evidence with respect to statements made to him by the deceased Cieslik. Rather, it is proposed that he would provide evidence concerning statements made

by the Respondent Cooper which he, Mr. Glassco, overheard. Unlike the proposed evidence from Crane, Caruana and Green, then, the evidence of Mr. Glassco would be evidence of his direct observation of the Respondent Cooper making certain statements which are alleged to be material to the issues before this Board of Inquiry.

With respect to the proposed evidence from Crane, Caruana and Green, Counsel for the Respondents argues that this evidence should be ruled inadmissible on the basis that it is hearsay evidence and, futher, on the basis that it is hearsay evidence which has no probative value and whose admission would be highly prejudicial to the Respondents. Both Counsel agree, of course, that a Board of Inquiry sitting under the Ontario Human Rights Code is not bound by law to apply the technical rules of evidence. Section 15(1) of the Statutory Powers Procedure Act, R.S.O., 1990, c.S-22 provides that a tribunal such as this can admit evidence whether or not the evidence is "admissible as evidence in a court." Nonetheless, Counsel for the Respondents argues that while Section 15 confers a discretion upon a tribunal to admit hearsay evidence, that discretion ought not be exercised in favour of admission of evidence of the kind at issue here.

In making this argument, Counsel for the Respondents drew some support from recent Canadian jurisprudence reconsidering the scope of the hearsay rule. Two of these cases, Regina v. Khan (1990), 59 C.C.C. (3rd) 92 (S.C.C.) and R. v. Smith (1992), 94 D.L.R. (4th) 590 (S.C.C.), involve criminal prosecutions and thus arose in the context of proceedings in which the hearsay rule clearly applies.

The third authority relied upon, Khan v. College of Physicians & Surgeons of Ontario (1992), 94 D.L.R. (4th) 193 (Ont.C.A.), arose in the context of an application for judicial review of a decision of the Discipline Committee of the College of Physicians & Surgeons of Ontario. Although not a criminal proceeding, the rules of evidence generally and the hearsay rule in particular were made applicable to proceedings before the Discipline Committee by Section 12(6) of the Health Disciplines Act, R.S.O., 1990, c.H-4. In these cases, the Supreme Court of Canada and the Ontario Court of Appeal have indicated that the exceptions to the hearsay rule ought to be given a flexible interpretation and, more specifically, that evidence of a hearsay nature should be admissible if its admission is reasonably necessary in the sense that other evidence of the evidence in question is unavailable and if there are sufficient indicators that the hearsay statements are likely to be reliable. Counsel for the Respondents suggested that this test of admissibility should provide some guidance in the present context and, in his view, the evidence of Ms. Crane and Messrs. Caruana and Green lacked the necessary element of reliability.

Counsel for the Commission argued in response that the two elements of necessity and reliability are met in the present circumstances. The evidence concerning statements made by the deceased Cieslik was necessary by virtue of the fact that Mr. Cieslik himself cannot testify. The statements were said to have been made in circumstances suggesting reliability because of the disinterest, at least in the case of Mr. Caruana and Mr. Green, of

the potential witnesses in the matter. Alternatively, Counsel for the Commission argued that, inasmuch as the hearsay rule and its exceptions were inapplicable to the present proceeding, the appropriate course was simply to admit the evidence and consider any deficiencies in its persuasive force at the conclusion of the proceeding in weighing the relevancy of the evidence in question to the matters at issue. On this view, then, the discretion to accept hearsay evidence should be invariably exercised in favour of acceptance of the evidence, assuming it to be relevant, subject to its weight being considered by the tribunal in reaching findings with respect to the matters to which the evidence relates.

An alternative approach is suggested in a decision of Ontario Court of Appeal relied upon by Counsel for the Commission, Re City of Toronto and Canadian Union of Public Employees, Local 79 (1982), 133 D.L.R. (3rd) 94 in which the Court ruled on the admissibility, in the context of a grievance arbitration concerning a dismissed employee, of a report made by a county court judge under the Municipal Act which touched upon the events in dispute. An arbitration board, like a board of inquiry under the Human Rights Code, is entitled to accept such evidence as it considers proper "whether admissible in a court of law or not." The arbitration board had refused to admit the report in question. The Ontario Court of Appeal, however, held that the board erred in so doing. The report should have been admitted, subject to being contested by other evidence and, of course, to having its probative value weighed by the board in determining whether to place any reliance

upon its contents. The Court of Appeal went on to note, at page 109, that although it would have been appropriate in that case to accept the report as evidence, there might nonetheless be cases where, for reasons related to the proceedings themselves, it would be inappropriate to admit the evidence. The Court stated that, "[t]here may be cases where prejudice to an employee will so far outweigh the evidentiary value of a report that it should not be admitted." In other words, the Court of Appeal appeared to take the view that although the discretion to admit hearsay evidence in a proceeding of the kind at issue in the City of Toronto case would normally be exercised in favour of admitting hearsay evidence, there may be exceptional circumstances in which the discretion could or should be exercised by refusing to accept the evidence.

There would appear, then, to be three possible approaches to the exercise of a discretion by a board of inquiry under the Ontario Human Rights Code to accept hearsay evidence. First, one might attempt to apply the reasoning of cases such as R. v. Khan by analogy. The tribunal would consider whether the evidence is necessary to the proceeding and given in circumstances suggesting its reliability. Secondly, a tribunal could exercise its discretion invariably in favour of admission, assuming relevance, subject to being weighed appropriately for its probative value at the conclusion of the proceeding. Thirdly, a tribunal could follow the approach suggested in the Re City of Toronto by refusing to accept evidence in unusual circumstances where the prejudicial effect of accepting the evidence far outweighs its potential

probative value.

In choosing from among these approaches, I have come to the conclusion that it would be inappropriate simply to apply the reasoning in the Khan case in the present context. This would be, in effect, to apply the hearsay rule, and its exceptions, in the context of a proceeding before a board of inquiry. The evident intent of the Statutory Powers Procedure Act with respect to the acceptance of evidence in proceedings before such tribunals is to encourage tribunals to refrain from technical application of the rules of evidence. There are a number of reasons for this, not the least of which is that this approach avoids the peril that the tribunal will, through over-zealous application of the rules of evidence, exclude admissible evidence and create a basis for judicial review of the tribunal's decision. A further rationale, of course, is that that Act seeks to encourage less formality in the procedures and proceedings of administrative tribunals. To be sure, the reasoning offered in cases such as Khan would be helpful to a tribunal in attempting to determine how much weight, if any, should be given to hearsay evidence. The weight to be given hearsay evidence will rest, in large measure, on the extent to which it is considered to be reliable and the reasoning in this line of authority is doubtless of assistance in this regard.

The second possible approach - wholesale acceptance of hearsay evidence - does have some attraction. It avoids the necessity for technical rulings with respect to which the tribunal may ultimately be considered to have erred. In the Human Rights Code context it

will encourage the Complainant in the belief that all possible means of exploring the relevant evidence have been pursued. It might further be argued that any risks of unfairness to the Respondent are avoided by ensuring that the tribunal gives no more weight than is appropriate to such hearsay evidence as is accepted.

I have come to the conclusion, however, that the approach suggested by the City of Toronto case is preferable to one involving virtually no discretion to refuse to accept hearsay evidence. As the Court of Appeal suggested in City of Toronto, there should be a strong presumption in favour of accepting the evidence as admissible though subject, of course, to contestation by other evidence and the weighing of probative value. In an unusual case, however, where the effect of accepting the evidence would appear to be highly prejudicial to the respondent and where the evidence in question has little or no probative value, it would be appropriate for a board of inquiry to refuse to accept the evidence. It is not only the Complainant, of course, who has an interest in the fairness of the proceeding. The Respondent also has such an interest and, in my view, proper recognition of that interest could lead to a refusal to accept hearsay evidence in unusual circumstances of this kind.

In applying this test to the proposed hearsay evidence to be led from Ms. Crane, Mr. Caruana and Mr. Green, a number of factors appear to be relevant. First, the evidence concerning the statements made by the deceased Cieslik would appear to have little or no probative value for the following reasons. The evidence

concerning Mr. Cieslik's statements will purport to give an account of Mr. Cieslik's opinion of the Respondents Cooper's attitudes and how those attitudes might affect his participation in the Respondent corporation's decision concerning the Complainant's probationary employment. That is to say, the evidence does not concern statements made by the deceased Cieslik which offer a description of certain factual events. Rather, it will provide evidence of his opinion concerning the inferences that he felt should be drawn from certain facts which will not be referred to in this evidence.

The fact that this evidence relates to the deceased's opinions rather than factual matters leads to a number of problems. First, this is opinion evidence of a kind which, if led directly, might be an appropriate subject for objection. As Counsel for the Respondents noted, if an attempt were made to lead such opinion evidence directly from a witness he would object that such evidence would be inappropriate as being evidence on the very matter which is in dispute before the tribunal and upon which the tribunal is expected to reach an opinion based on certain factual evidence. The subject of opinion evidence is discussed in J. Sopinka, S.N. Lederman, and A.W. Bryant, The Law of Evidence in Canada, (1992), chapter 12. Further, the fact that the facts taken into account by Mr. Cieslik in reaching his opinion will not be made known in the evidence of these witnesses means that neither the Respondents nor the Board of Inquiry will be in a position to evaluate the soundness of Mr. Cieslik's inferences and opinions. It would

appear to be quite inappropriate to, in effect, accept Mr. Cieslik's opinion with respect to this critical question without having any knowledge of the basis upon which he formulated that opinion. Thus, in addition to the usual dangers associated with hearsay evidence, the inability to cross-examine the deponent, the fact that the statements were made in an informal setting, and so on, this particular hearsay evidence is of such a nature that it would be inappropriate to give it significant weight.

On the other hand, the prejudice involved in admitting this evidence is plainly quite substantial. If given any credence, the evidence is highly damaging on a critical issue in the present proceeding. More importantly, the evidence is essentially unanswerable since the basis for the alleged opinions of Mr. Cieslik will not be revealed in the evidence. Thus, the Respondents would, if the evidence were to be admitted, be placed in a position of trying to prove that nothing Mr. Cooper every said or did to the knowledge of Mr. Cieslik could have reasonably led the latter to come to such opinion. Such a burden ought not be imposed on respondents, in my view, in circumstances where the hearsay evidence in question is of little or no probative value. Accordingly, I have come to the conclusion that the objection to the hearsay evidence of Ms. Crane, Mr. Caruana and Mr. Green concerning alleged statements made by Mr. Cieslik, set out in Exhibit 7, is well taken in that the evidence objected to by the Respondents ought not to be accepted.

If I have erred in concluding that I should not simply apply the Khan reasoning to the present circumstances, it may be helpful to consider whether, in my view, the application of that standard in the present context would lead to a decision to accept the evidence. In my view, it would not. Although the unavailability of Mr. Cieslik clearly meets the criterion of necessity, I do not think that the criterion of reliability is met in the present circumstances. Though it is true that Mr. Cieslik is, in some, a disinterested party, this is not enough in my view to establish reliability in the present context. Again, the evidence will pertain to certain opinions held by Mr. Cieslik and will not provide the factual foundation for those opinions. Thus, the tribunal hearing this evidence is not in a position to fairly assess the soundness or reliability of Mr. Cieslik's opinions. Accordingly, I would have concluded, had I applied the reasoning in Khan, that the evidence was not rendered admissible on that basis.

The foregoing considerations do not apply, however, to the proposed evidence of Mr. Glassco. It is proposed, in Exhibit 7, that Mr. Glassco will give evidence of his own observations of certain incidents involving Mr. Cooper. Mr. Glassco will be subject to cross-examination on such matters and Mr. Cooper, of course, will have a full opportunity to testify in response. The basis of Counsel for the Respondents' objection to the admission of Mr. Glassco's evidence, which requires consideration, is that non-disclosure, until a very late stage in this proceeding, of the availability and nature of Mr. Glassco's evidence constitutes such

an unfairness to the Respondents that the evidence ought to be rejected for that reason. Counsel for the Respondents has not offered jurisprudential support for this proposition in the form of either judicial decisions or decisions of other boards of inquiry. Nor am I aware of any basis, in principle, for exercising a discretion to refuse to accept evidence on the basis of an objection of this kind in the context of proceedings under the Ontario Human Rights Code. If, as I have concluded above, it is correct to conclude that the Commission was not under any legal obligation to disclose the nature of the evidence it proposed to lead, I do not see any basis for holding that non-disclosure leads to inadmissibility of the evidence.

For the foregoing reasons, then, it follows that the Respondents have enjoyed partial success with respect to the motion concerning the admissibility of the proposed evidence referred to in Exhibit 7. Though the hearsay evidence to be led through Ms. Crane, Mr. Caruana and Mr. Green concerning certain opinions the deceased Cieslik held concerning the Respondent Cooper ought not be accepted as admissible in this proceeding, the objection made to the evidence of Mr. Glassco concerning statements made by the Respondent Cooper is dismissed.

Dated at Toronto this 31ST January, 1993

John B. McCamus
Board of Inquiry